Accepting *McCulloch* v. *Maryland* as a premise, it would seem that if the constitution is to keep pace with the changing times, a thoughtful study of considerations such as these is imperative. They indicate a commercial situation which should have a direct practical bearing on an interpretation of the powers of Congress in this connection. Yet it is questionable whether it should be necessary as the act stands for a court to consider these and similar factors. No doubt they would be vital were the federal government attempting to create corporations with these powers in defiance of state law. The clause, "when not in contravention of state or local law," however, seems to render it possible for a state at any time to deny by an appropriate statute the power of the bank so to proceed.[16]

If this is so — and it is difficult to read the clause in any other way — the meaning of section 11 (K) comes merely to this: that the sovereign power which erected the corporation and which could therefore destroy it for the unauthorized assumption of trust company power, hereby formally waives its right to do so. To paraphrase it, the federal government in effect agrees that if the bank chooses to exert this power, and the state, which could object, does not do so, the federal government, which could also object, will not do so either. In this there is no pretense that Congress can authorize such power. That such authority inheres in the states is, indeed, expressly affirmed by the words of the section; and if (as we must suppose) the latter is to have a meaning, it follows that the utmost that it attempts is to operate upon the federal government's undoubted power of attack by *quo warranto*. It is clear that the sovereign may by legislation waive this right;[17] and that the words of the section are sufficient to effect a waiver seems evident. On this view, which, it is submitted, represents the preferable interpretation of the section, the question of extending the doctrine of *McCulloch* v. *Maryland* is not raised, and the statute may be sustained without adverting to the constitutional difficulties discussed by the state court.

A NEW VARIETY OF UNDUE DISCRIMINATION UNDER THE INTERSTATE COMMERCE ACT.— Once it has properly taken jurisdiction, a rate fixed by the Interstate Commerce Commission will not be disturbed by a reviewing court unless it plainly falls outside a wide range of administrative discretion.[1] Before the Commission can assume jurisdiction, however, it must find a clear violation of law. It is not enough that the

companies, exhibit the same tendency. See COLO. REV. STAT., 1912, § 305; MINN. GEN. STAT., 1913, §§ 6409, 6416, 6417; N. H. LAWS, 1915, ch. 109, §§ 14 and 34; KIRBY'S DIG. (Ark.), 1904, § 888.

In a few states no such provisions seem to exist, namely, Delaware, Maryland, Michigan, Nebraska, Pennsylvania, and Wisconsin. In two of these unauthorized assumption of banking powers is expressly made illegal. Michigan, 5 HOWELL'S STAT., §§ 14861–69; Nebraska, GEN. L., 1909, § 3710.

[16] Thus, New Hampshire has a statute prohibiting any corporation, national or state, from acting as administrator or executor. N. H. LAWS (1915), ch. 109, § 34.

[17] People *v.* Ulster & D. R. Co., 128 N. Y. 240, 28 N. E. 635; People *v.* Los Angeles Electric Ry. Co., 91 Cal. 338, 27 Pac. 673.

[1] Illinois Central R. Co. *v.* Interstate Commerce Commission, 206 U. S. 441.

rate as finally determined be reasonable; there must be an express finding, based on evidence, that the preëxisting rate is unreasonable.[2] Where discrimination is the ground of complaint, jurisdiction must be based on a clear finding that one rate is unduly higher than another rate for a similar service.[3]

How seriously this jurisdictional limitation may hamper the Commission is shown by the recent decision of the Supreme Court, in *Philadelphia & Reading Ry. Co.* v. *United States*, 240 U. S. 334.[4] The complainant was one of several neighboring and competing cement works. It relied exclusively on the defendant railroad for connection with the principal consuming centers of the east. Other railroads served the competing producers. As to Jersey City, these other railroads had joined in establishing a flat 80-cent rate, but the defendant railroad persisted in charging $1.35. As to the other large consuming centers, the defendant had joined in equalizing rates with other carriers. The result was to drive complainant's cement from the Jersey City market. Without passing on either the intrinsic reasonableness of the $1.35 rate, nor on its relative reasonableness as compared with the rate charged by the defendant carrier to the other consuming centers, the Commission found the refusal to equalize rates to Jersey City a discrimination against that city, and ordered the defendant to desist. This order, affirmed by the District Court, the Supreme Court has set aside.

Considering, for the moment, only the Jersey City rates, the case presents the elementary situation of several producers competing for a common market, and complaint by one of them that his rates, when compared with those of his competitors, are discriminatory. Ordinarily this would be a typical case for relief. But here the same carrier did not control both rates. Where independent carriers contribute to a discriminatory situation, can it be said that any one is guilty of discrimination? [5] *Damnum* there clearly may be: but is there *injuria?* It is clear that there is no inherent impossibility in prohibiting such two-carrier discrimination; the railroads can be regulated as a single system at least as well as they can be individually.[6] But jurisdiction for the Interstate Commerce Commission must be found, in this case, in a violation of section 3 of the act. In the ordinary sense of the word, discrimination is made up of two necessary parts — favor on the one hand and prejudice on the other, and you can no more discriminate without being responsible for both than you can cut with scissors without using both blades. But the word "discriminate" is not found in section 3. "It shall be unlawful for any common carrier . . . to . . . give any undue

[2] See Interstate Commerce Commission *v.* Louisville & Nashville R. Co., 227 U. S. 88, 92. *Cf.* Interstate Commerce Commission *v.* Northern Pacific Ry. Co., 216 U. S. 538, 544.

[3] See Interstate Commerce Commission *v.* Chicago, etc. Ry. Co., 218 U. S. 88.

[4] See the opinion in the District Court, s. c., 219 Fed. 988, for a more complete statement of the facts. See also s. c., 27 I. C. C. 448, and, on a rehearing, 31 I. C. C. 277.

[5] For a holding that such a carrier is not guilty, see Central Pine Ass. *v.* Vicksburg, etc. R. Co., 10 I. C. C. 193, 201. See the statement in 1 DRINKER, THE INTERSTATE COMMERCE ACT, 282.

[6] That the Commission does not now regulate the railroads as a single system, see Chicago Lumber, etc. Co. *v.* Tioga, S. E. Ry. Co., 16 I. C. C. 323, 332.

. . . advantage to any particular . . . locality, or to subject any particular . . . locality . . . to any undue . . . disadvantage in any respect whatsoever." [7] This separation of the two parts and the use of the word "or" instead of "and" seems to require the guilty carrier to be responsible for only one and not both. "Or" may be construed as "and" if the statutory purpose so requires,[8] but section 3 struck at discrimination in all its forms [9] and must be construed expansively. Nevertheless, a statute must be construed also in the light of the power delegated to enforce it as well as in the light of its purpose, and the Commission has been denied power over minimum rates.[10] Although not necessary to the punishment of two-carrier discrimination, this power has been recognized as indispensable to its effective prevention.[11]

Under either construction, however, if one of the two rates is a constant, the carrier in control of the other could be held guilty of any undue difference, just as one can use scissors by pressing one blade on the table. An absolutely constant rate is impossible until the Commission has power to set minimum rates, but a rate may become practically a constant for some such reason as water competition, or even, as in the principal case, a continuing readiness in the other carrier to agree to equal rates. It is submitted that the Commission would be justified in finding such practical constancy as a fact, conclusive on a reviewing court.[12]

In the principal case, however, the Commission relied on the further fact that as to all the other great consuming centers, Baltimore, Philadelphia, New York, etc., the defendant had joined the other carriers in equalizing rates. Assuming that it was not guilty of discrimination where only one consuming center was concerned, the argument was that by participating in equal rates to these other centers it was conferring an advantage on them which it refused to confer on Jersey City, thus discriminating against the latter.[13] The argument requires a further analysis of the elements of discrimination.

The simplest discriminatory situations are, first, two similarly circumstanced producers serving a common market, and second, two similarly circumstanced markets served by a common producer. An undue discrepancy in rates would, on the one hand, drive one producer from the market, and, on the other, deprive one market of the service of the producer. The situation in the principal case was nothing more than a combination of these two; several producers each served several markets. In respect to each producer, the situation was like the first above; in

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[7] It is found elsewhere in sections 2 and 13, but only as a compendious phrase, and therefore only in a technical sense.

[8] See 2 LEWIS' SUTHERLAND ON STATUTORY CONSTRUCTION, § 397.

[9] See Houston, E. & W. T. Ry. Co. *v.* United States, 234 U. S. 342, 356.

[10] Interstate Commerce Commission *v.* Cincinnati, etc. Ry. Co., 167 U. S. 479; TWENTY-FIFTH ANNUAL REPORT OF THE COMMISSION, 1911, p. 38. The amendment of section 15 in 1906 extended the Commission's power only over maximum rates.

[11] See the doubt in the minds of the Commission when they attempted it in Eau Claire Board of Trade *v.* Chicago, etc. Ry. Co., 5 I. C. C. 264, and also W. Z. RIPLEY, RAILROADS: RATES AND REGULATIONS, p. 254, 624.

[12] Baltimore & Ohio R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481, 494; United States *v.* Louisville & Nashville R. Co., 235 U. S. 314, 320; Pennsylvania Co. *v.* United States, 236 U. S. 351, 361.

[13] See the order of the Commission in 27 I. C. C. 448.

respect to each market, like the second. The Commission's finding that Jersey City was discriminated against must, then, rest on the proposition that a disparity between rates from several producers, to one market, is a prejudice not only to the producer who gets the higher rate, but to the market. If this disparity, with respect to Jersey City, is a disadvantage, then equality, with respect to New York, is an advantage, and a case under the wording of the act is made out. It does not seem to be an unreasonable conclusion that such a prejudice in fact exists. If the market is a distributing as well as a consuming center, it may be distinctly prejudiced by a loss in the number of producers using it as such. If it be only a consuming center, the shorter supply might well cause prices to rise. At the least, it would seem to be a fair question of fact, upon which the finding of the Commission would be conclusive.

As neither this question of prejudice by causing an unequal ratio of rates nor the problem of two-carrier discrimination was discussed by the Supreme Court, one may hope that the decision will not stand as a precedent on either point.

THE RELATION OF THE TECHNICAL TRADE-MARK TO THE LAW OF UNFAIR COMPETITION. — The law relating to infringements of technical trade-marks was fully developed before the growth of the law of unfair competition.[1] However, from an analytical viewpoint, unfair competition is the genus, and the infringement of the technical trade-mark a species.[2] In each case the redress is based upon the right to be protected in the goodwill of a trade or business. The essence of the wrong consists in the palming off of his own goods by one manufacturer or vendor as the goods of another.[3] Three recent decisions [4] of the United States Supreme Court bring out the close relation between these two branches of the law relating to piracy of goodwill.

It was at one time thought that the right in a trade-mark was without territorial limits.[5] However, such a limit has been set by the Supreme Court in the cases of *Hanover Star Milling Co.* v. *Metcalf* and *Allen and Wheeler Co.* v. *Hanover Star Milling Co.*, considered together on writs of *certiorari*.[6] In the first case, the dispute was between two parties who adopted the same trade symbol subsequent to appropriation by another in a different territory, and the determination of their rights *inter se*,

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[1] See HOPKINS, TRADE-MARKS, 2 ed., § 1.

[2] See ROGERS, GOODWILL, TRADE-MARKS AND UNFAIR TRADING, 127. "In fact, the common law of trade-marks is but a part of the broader law of unfair competition." Pitney, J., in Hanover Star Milling Co. *v.* Metcalf, 240 U. S. 403, 413.

[3] See Canal Co. *v.* Clark, 13 Wall. 311, 322; McLean *v.* Fleming, 96 U. S. 245, 251; Goodyear Co. *v.* Goodyear Rubber Co., 128 U. S. 598, 604; Stix, Baer & Fuller, etc., Co. *v.* American Piano Co., 211 Fed. 271, 279; Reddaway *v.* Banham, [1896] A. C. 199, 209.

[4] For statements of these cases, see RECENT CASES, pp. 792, 793.

[5] See Kidd *v.* Johnson, 100 U. S. 617, 619; Derringer *v.* Plate, 29 Cal. 292, 295; HESSELTINE, TRADE-MARKS AND TRADE NAMES, 111. However, the infringements in these cases were in territory into which the goodwill of the owner had already extended. Compare Hygeia Distilled Water Co. *v.* Consolidated Ice Co., 144 Fed. 139, in which case the infringement was in territory to which complainants' goodwill would naturally expand.

[6] 240 U. S. 403.